ATTORNEY FOR APPELLANT:

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IN THE
COURT OF APPEALS OF INDIANA

HENRY HILLARD,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A03-0612-CV-592
	)	
MARY HILLARD,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Edward Grimmer, Special Judge
Cause No. 45C01-9410-DR-2045

October 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Henry Hillard (Father), appeals the trial court's Order which found Father's failure to pay child support to be willful and ordered his incarceration for contempt of the trial court's Order. The jail time was withheld for thirty days to allow payment on the arrearage.

We affirm.

ISSUES

Father raises three issues on appeal, which we restate as follows:

(1) Whether the trial court's conclusion that Father's child support obligation was not modifiable can support the court's subsequent finding that Father was in contempt of court;

(2) Whether the trial court erred by ordering Father's incarceration for non-payment without first holding a hearing to determine whether Father's non-payment was willful; and

(3) Whether the trial court erred by increasing Father's bond from ten thousand dollars to fifteen thousand dollars in an Order responding to Father's Motion to Stay.

FACTS AND PROCEDURAL HISTORY

On July 8, 1960, Father was married to Mary Hillard (Mother). Six children were born of the marriage. This appeal pertains to their handicapped, adult child, K.H., born January 2, 1968, and Father's child support arrearage.

On December 3, 1994, Father filed a Petition for Dissolution of Marriage. Although

K.H. was emancipated at the time of Father and Mother's divorce, K.H. became ill and was taken in by Mother. Hillard was ordered to pay child support in the amount of ninety-two dollars and forty-eight cents per week.

On March 18, 2004, the trial court found Father in arrears in the amount of nine thousand seven hundred twenty-four dollars and forty-two cents. Father was ordered by the trial court to pay five thousand dollars within thirty days or serve a sixty-day sentence for being found in contempt of court. The trial court also imposed an additional twenty-five dollar per week payment toward his child support arrearage.

On July 19, 2004, the trial court modified Father's child support payments to seventy-five dollars per week, plus an additional twenty-five dollars per week toward his arrearage. On November 22, 2004, the trial court, based on an agreement between Father and Mother, modified Father's child support payments; Father was to pay Mother fifty dollars per week for child support. The weekly twenty-five dollar arrearage payment previously imposed by the trial court remained in effect.

On August 22, 2006, a hearing was held on Mother's Contempt Citation that alleged Father was more than ten thousand dollars in arrears on his child support payments. In response, the trial court issued an Order stating, in pertinent part:

> 1. That there was uncontroverted evidence presented that [Father] failed to make child support payments as previously ordered by this [c]ourt.
>
> 2. That [Father's] arrearage totals Ten Thousand, Six Hundred and Forty-Six Dollars and Thirty Eight Cents ($10,646.38), from the date [the] above captioned parties were granted a Decree of Dissolution on or about the 19th day of October, 1995, to today's date of August 22, 2006.

3. That there has been no showing that nonpayment of [Father's] child support obligations is excused.

4. That this [c]ourt hereby finds that [Father] has engaged in willful failure to pay child support as Ordered.

5. That this [c]ourt further finds that the gradual reduction of the previously existing arrearage has been unsuccessful, as [Father] has willfully failed to follow this [c]ourt's previous Orders to make weekly payments of Twenty Five Dollars ($25.00) toward same arrearage.

6. That, therefore, [Father] is hereby in Contempt of this [c]ourt's Orders.

7. That [Father] is hereby sentenced to serve ninety (90) days in the Lake County Jail for being in Contempt of this [c]ourt's Orders; however, the imposition of such sentence is hereby withheld for thirty (30) days to allow [Father] to pay One Thousand Dollars ($1,000.00) to the Clerk of the Lake County Court within thirty (30) days of this Order, after which time, if paid, the sentence is stayed, but if left unpaid, the sentence will be imposed as Ordered.

8. That, in addition to [Father's] *current unmodifiable child support obligation* of Fifty Dollars ($50.00) per week, [Father] is to pay Five Hundred Dollars ($500.00) per month, by or before the 10th day of each month, with the first such payment due October 10, 2006, to be paid [to] the Clerk of the Court of Lake County, until all child support arrearage and previously Ordered interest obligations are paid in full.

9. That if [Father] fails to make this monthly Five Hundred Dollar ($500.00) payment at any time, the aforementioned ninety (90) day jail sentence is herein re-imposed.

10. That the previously Ordered arrearage payment of Twenty-Five Dollars ($25.00) per week is herein modified by the arrearage payments as specified herein.

11. That the total arrearage amount of Ten Thousand, Six Hundred [] Forty-Six Dollars and Thirty Eight Cents ($10,464.38) is herein reduced to judgment and may be held as a judgment lien against [Father's] property.

(Appellant's App. pp. 8-10) (emphasis added).

Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Initially, we note that Mother did not file a brief. When the appellee fails to submit an answer brief we need not undertake the burden of developing an argument on the appellee's behalf. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, we will reverse the trial court's judgment if the appellant's brief presents a case of *prima facie* error. *Id.* (citing *Gibson v. City of Indianapolis*, 179 N.E.2d 291, 292 (1962)). *Prima facie* error in this context is defined as, "at first sight, on first appearance, or on the face of it." *Trinity Homes*, 848 N.E.2d at 1068 (quoting *Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999)). Where an appellant is unable to meet this burden, we will affirm. *Trinity Homes*, 848 N.E.2d at 1068.

I. *Contempt Findings*

Father first contends that the trial court's conclusion that his child support obligation was not modifiable led to the trial court's subsequent erroneous conclusion finding Father in contempt. Because we find the trial court's ability to modify Father's child support obligation had no bearing on the trial court's finding him in contempt, we disagree.

Trial courts have jurisdiction to modify child support obligations. *See* I.C. § 31-16-8-1. Irrespective of a trial court's ability to modify a parent's child support obligations, however, is a trial court's ability to use contempt citations to enforce child support obligations. *Marks v. Tolliver*, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005) (citing *Pettit v. Pettit*, 626 N.E.2d 444, 447 (Ind. 1993)). While money judgments are generally not enforceable by contempt findings, "contempt is always available to assist in the enforcement of child support . . . including orders to pay accrued arrearages and money judgments against

delinquent parents for past due amounts." *Id.* at 706. We will reverse the trial court's finding of contempt where an abuse of discretion has been shown, which only occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Mitchell v. Mitchell*, 785 N.E.2d 1194, 1198 (Ind. Ct. App. 2003). Furthermore, when we review a contempt order, we neither reweigh the evidence nor judge the credibility of the witnesses. *Id.*

Here, the trial court found Father in contempt for the following reasons:

> 1. That there was uncontroverted evidence presented that [Father] failed to make child support payments as previously ordered by this [c]ourt.
>
> * * *
>
> 3. That there has been no showing that nonpayment of [Father's] child support obligations is excused.
>
> 4. . . . [Father] has engaged in willful failure to pay child support as Ordered.
>
> 5. . . . [T]he gradual reduction of the previously existing arrearage has been unsuccessful, as [Father] has willfully failed to follow the [trial court's] previous Orders to make weekly payments of Twenty Five Dollars ($25.00) toward same arrearage.

(Appellant's App. pp. 8-9). Father, however, takes issue with the trial court's statement:

> 8. That, in addition to [Father's] *current unmodifiable child support obligation* of Fifty Dollars ($50.00) per week, [Father] is to pay Five Hundred Dollars ($500.00) per month, by or before the 10th day of each month . . . until all child support arrearage and previously Ordered interest obligations are paid in full.

(Appellant's App. p. 9) (emphasis added). While the trial court erred in saying that Father's child support obligation cannot be modified, in this instance the error is harmless because the

trial court found Father had willfully failed to pay child support. Moreover, the trial court did not abuse its discretion finding father in contempt of court.

II. *Bench Warrant*

Additionally, Father argues that the trial court erred by issuing a bench warrant for his arrest due to his failure to pay child support. Particularly, Father argues the trial court should have first held a hearing to determine whether Father's non-payment was willful before ordering his incarceration for non-payment.

Unlike criminal indirect contempt, the primary objective of a civil contempt proceeding is not to punish the contemnor but to coerce action for the benefit of the aggrieved party. *Thompson v. Thompson*, 811 N.E.2d 888, 905 (Ind. Ct. App. 2004), *trans. denied*. In a civil contempt action, imprisonment is for the purpose of coercing compliance with the order. *MacIntosh v. MacIntosh*, 749 N.E.2d 626, 631 (Ind. Ct. App. 2001), *trans. denied*. Nevertheless, a contempt order that neither coerces compliance with a court order nor compensates the aggrieved party for loss, and does not offer an opportunity for the recalcitrant party to purge himself, may not be imposed in a civil contempt proceeding. *Flash v. Holtsclaw*, 789 N.E.2d 955, 959 (Ind. Ct. App. 2003), *trans. denied*. As such, one who is held in civil contempt for failing to pay support should be ordered to pay the total arrearage and be given an opportunity to purge himself or herself of contempt by paying the amount owed. *Marks*, 839 N.E.2d at 707.

Father cites *Marks* for support because there we reversed the trial court's Order to issue a Writ of Attachment if "the original petitioner fell behind in his/her child support payments by 0 weeks." *Marks*, 839 N.E.2d at 707. We reversed finding the trial court

fashioned that Order "without inquiry into the obligor's ability to pay." *Id*. at 708. However, we find the instant situation distinguishable from *Marks*.

Our review of the record in this case indicates that on August 22, 2006, a hearing was held with respect to Mother's verified petition for contempt citation. At that time, the trial court concluded Father was in arrears, "due to [his] willful failure to pay," and sentenced him to ninety days in jail. (Transcript p. 23). His sentence was withheld upon two conditions: (1) within thirty days Father pays one thousand dollars to the clerk of the court; and (2) by the 10th day of every month, Father pays five hundred dollars, over and above his fifty dollar a week child support payment, toward his arrearage until it is eliminated. The trial court cautioned Father that if he failed to comply with the payment provisions, his sentence would be reinstated. Thereafter, on October 17, 2006, Mother filed a Motion for Bench Warrant due to Father's failure to pay. On October 24, 2006, the trial court, pursuant to its Order on August 22, 2006, found Father in contempt, granted Mother's Motion, and issued a bench warrant for Father. Thus, we find the trial court fashioned an Order that provides for prospective incarceration upon omission of any future child support installment following an inquiry into Father's ability to pay. As such, the trial court followed the prevalent case law as established in *Marks*.

III. *Bond*

Lastly, Father argues the trial court erred by increasing his bond from ten thousand dollars to fifteen thousand dollars in its response to his Motion to Stay. Specifically, Father claims a bond cannot be increased without an intermittent hearing. However, Father provides

no support for his argument pursuant to Ind. Appellate Rule 46(A)(8)(a). Thus, we conclude Father's argument on this issue is waived. *See Nar v. State*, 869 N.E.2d 472, 482 (Ind. Ct. App. 2007).

CONCLUSION

Based on the foregoing, we conclude that the error of the trial court by stating Father's current child support payments are not modifiable is harmless ; the trial court did not abuse its discretion in finding Father in contempt; the trial court determined Father's non-payment was willful before issuing a warrant for his arrest; and Father failed to establish that the trial court erred by increasing Father's bond without a hearing.

Affirmed.

SHARPNACK, J., and FRIEDLANDER, J., concur.